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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-912

EDWARD V. HANRAHAN; RICHARD S. JALOVEC; DANIEL GROTH; RAYMOND BRODERICK; EDWARD CARMODY; JOHN CISZEWSKI; WILLIAM CORBETT; JAMES DAVIS; JOSEPH GORMAN; LYNWOOD HARRIS; ROBERT HUGHES; GEORGE JONES; PHILIP JOSEPH; WILLIAM KELLY; JOHN MARUSICH; JOHN MULCHRONE; HARRY ERVANIAN; JOHN MEADE; ROBERT KUKOWINSKI; and JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, Administratrix on behalf of the Estate of FRED A. HAMPTON, Deceased; FANNIE MAE CLARK, Administratrix on behalf of the Estate of MARK CLARK, Deceased; VERLINA BREWER; DEBORAH JOHNSON; RONALD SATCHEL; HAROLD BELL; BLAIR ANDERSON; BRENDA HARRIS; and LOUIS TRUELOCK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Introduction

In the Brief for Respondents, many facts are alleged which are untrue*, or as admitted in their appendices,

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* E.g.: At Page 1 it is said that Plaintiffs were asleep when fourteen police officer defendants "raided" the apartment. Plaintiff Truelock testified that in the early morning hours of December 4, 1969, Plaintiffs Mark Clark, Harold Bell and Brenda Harris were in the living room with him. Clark was seated in a chair behind the entrance doorway and reading a book. Harris and Bell were asleep. Tr. 15646-50. He then heard voices of people outside on the porch. He and Clark went to the window to see who it was. Tr. 15653.

based on matters not admitted into evidence*, or on matters outside of the record such as a staff report of a Senate Committee and a report of an ad hoc commission of inquiry of which one of the trial counsel was executive director, and with which former Justice Goldberg disassociated himself. (Brief for Respondents, Appendix A, Page 12 and Appendix F). The latter report states at page 63 that survivors (Plaintiffs) appeared before the Special Cook County Grand Jury, but the Grand Jury's proceedings were not available to that "Commission", nor were statements made by Plaintiffs Bell and Anderson to their Attorneys. The latter statements, along with the Truelock and Harris statements, were introduced in the trial in the District Court. The "Commission" did not have these statements, which significantly contradicted their Special Grand Jury testimony, and show firing of weapons by Plaintiffs at the State Defendants, (see Appendix to this Reply Brief), therefore, the "Commission" report or any of its or its chairmen's conclusions should be ignored by this Court. Time does not permit State Defendants to respond to the above materials.

Petitioners, sometimes referred to herein as State Defendants, in their argument contained in this Reply to the Brief For Respondents, Anderson, Bell, Clark, Satchel and Truelock** will follow the same order as set forth in

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* E.g.: Appendix A to Brief for Respondents Page 13, fifth footnote, Page 15, footnote three. State Defendants were *not* served with this approximately 300 page appendix, and diligently sought to receive it from the Clerk of this Court. It did not arrive until about a week ago which was insufficient time to respond to such facts.

** As of March 10, 1980, no brief for respondents Brewer, Harris, Clark, Hampton and Johnson had been received by the State Defendants.

the Questions Presented and Reasons For Granting The Writ portions of their Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION AFFORDING ABSOLUTE IMMUNITY FOR ADJUDICATIVE FUNCTIONS.

The Superintendent of Police James Conlisk, not a defendant herein, had the legal authority to suspend for up to 30 days police officer defendants herein, or recommend disciplinary action be taken by the Police Board of the City of Chicago. Ill.Rev.Stat. 1969, Ch.24, §10-1-18-1. When carrying out this duty, the procedural due process rights (such as notice of charges, right of cross examination and confrontation) of such State Defendant police officers were required to be observed prior to suspension. *Muscare* v. *Quinn*, 520 F.2d 1212 (7th Cir. 1975), Petition for Certiorari dismissed as improvidently granted, per curiam opinion 425 U.S. 560 (1976).

In the instant case State Defendants Chicago police officers (not Cook County State's Attorney employees) Meade, Mulchrone, Kukowinski* and Ervanian* had been designated by the Superintendent of the Chicago Police

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* Kukowinski and Ervanian are defendants herein as to the 42 U.S.C. 1986. Section 1986 provides in part "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrong-

(footnote continued on following page)

Department to carry out the internal disciplinary process of the Chicago Police Department with regard to those Chicago Police Officers assigned to the Cook County State's Attorney's office who went on the service of the search warrant. Upon completion of this task, Mulchrone as Deputy Superintendent, made his recommendations to Chicago Police Superintendent Conlisk. Conlisk, who was deposed by Plaintiffs and who is not a defendant herein, had the option of suspending the police for up to thirty days, preferring charges before the Chicago Police Board, sending the matter back for further proceedings, or as he did on December 16, 1969 making the determination that no disciplinary action was warranted at that time. State Defendants submit that Conlisk's decision was clearly consistent with due process requirements governing internal disciplinary process of a police department, particularly in light of the fact that the Black Panther survivors of the incident, although having been asked to by Meade, refused to step forward and set forth the basis of any alleged wrongdoing of those police. Illinois law in 1969 mandated that before any Chicago Police Officer could be interrogated or examined by Meade or Mulchrone or by any other ". . . departmental agent or investigator the results of

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ful act be committed, shall be liable to the party injured . . ." On the other hand, contrary to what Respondents' Brief states at pages 47 and 48, "Meade and Mulchrone, through their participation in the IID investigaion, were not involved in the dimension of the conspiracy which resulted in the imprisonment and prosecution of the survivors without legal basis; rather their actions reasonably could have been found to have encouraged the continuation of the unfounded prosecution by suppressing the development of inconsistent evidence against the raiders, Hanrahan, and Jalovec." (A. 48) *Hampton* v. *Hanrahan*, 600 F.2d 600, 629 (7th Cir., 1979).

which hearing, interrogation or examination may be the basis for filing charges seeking his removal or discharge, he must be advised in writing as to what specific improper or illegal act he is alleged to have committed . . ." Ill. Rev. Stat. 1969, Ch.24, 10-1-18-1.

A. Plaintiffs assert that *Butz* v. *Economou*, 438 U.S. 478 (1978) is distinguishable because herein "There was no hearing, nor even any charges brought as a result of the investigation". Respondents brief, p. 50. The Seventh Circuit referred to the internal disciplinary procedure in question as a "hearing" in the opinion in *Hampton* v. *Hanrahan*, at page 633 (West Ed. Par. #30) (A. 57) and 635 (Par. #32) (A. 61) when determining that the three prosecutors attending it were immune under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

B. Plaintiffs lead one to believe that only if disciplinary measures were actually taken against police officers in the course of internal disciplinary procedures would immunity attach. In *Simons* v. *Bellinger*, 77-2012, 48 LW 2469 (D.C. Cir.Jan. 4, 1980) two attorneys were investigated by the committee established by the District of Columbia Court of Appeals to determine whether persons were engaging in unauthorized legal practice. The Committee ultimately dropped their investigation. The attorneys brought suit under the First, Fifth and Fourteenth Amendments as well as Article VI of the Constitution.

The attorneys contended, similar to the Plaintiffs herein, that the committee members were neither judges, prosecutors, jurors nor witnesses and, accordingly, could not benefit from any of the immunities afforded those participants in the legal process. The Court found that under *Butz*, the questions were whether the committee's judg-

ments are functionally comparable to those of a judge. The court found they were in that the committee members were clearly engaged in preparing and perhaps initiating a lawsuit, and that the committee was performing by delegation the inherent function of determining who was authorized to practice law. Herein, Mulchrone and Meade were exercising the internal disciplinary procedure to determine if disciplinary action of the police was warranted. It was recommended to the Superintendent that it wasn't, just as the Committee in *Simons* concluded their inquiry into the unauthorized practice of law. Moreover, they were constrained by due process and the requirements of Ill. Rev. Stat. 1969, Chap. 24, Sec. 10-1-18-1. Had they not followed Illinois law and due process, they could have been sued by these police who are not their co-defendants. *Muscare* v. *Quinn*. The Court in *Simons* gave absolute immunity under *Butz* to the Committee. Accord: Bar association for disciplinary lawyer, *Clark* v. *State of Washington*, 366 F.2d 678 (9th Cir. 1966); Parole Board members are immune when engaged in adjudicatory duties. *Thompson* v. *Burke*, 565 F.2d 231 (3rd Cir. 1977); *Cruz* v. *Skelton*, 502 F.2d 1101 (5th Cir. 1974); *Silver* v. *Dickson*, 403 F.2d 642 (9th Cir. 1968) cert. den. 394 U.S. 990, 89 S.Ct. 1447, 22 L.Ed. 765 (1969); *Keeton* v. *Procunier*, 468 F.2d 810 (9th Cir. 1972): "... We believe they also perform a quasi-judicial function in making recommendation to the Governor regarding the granting or revocation of pardons." Cf. *Burkes* v. *Callion*, 433 F.2d 318, 319 (9th Cir. 1970), (immunity of probation officers in submitting probation reports)." *People* v. *Chew*, 521 F.2d 400, 405, 406 (4th Cir. 1975).

C. Since State Defendants filed their Petition for Certiorari, this Court has decided *Martinez* v. *California*, 48 L.W. 4076 (January 15, 1980). There, a parole release determination was made, *after* which the parolee murdered a fifteen year old girl whose survivors then sued. At minimum, as to the four defendants, Meade, Mulchrone, Kukowinski and Ervanian, this case should be reversed, or remanded for further consideration, in light of *Martinez*. There it was held as a matter of law that the parole board's determination "... did not deprive appellants' decedent of life within the meaning of the Fourteenth Amendment", and that "... decedent's death is too remote a consequence of the parole officers' action to hold them responsible." No evidence was introduced to show that these Defendants had anything to do with the Cook County Grand Jury which indicted the survivors in January of 1970. They were not called upon to testify at that grand jury.*

II.

THE COURT BELOW ORDERED DISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL INFORMANT AND FAILED TO FOLLOW THIS COURT'S DECISION IN *FRANKS v. DELAWARE*.

A. The issue in *Franks* v. *Delaware*, 438 U.S. 154, 155 (1978) this Court said was: "Does a defendant in a crim-

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* The Court below has determined at Page 629 (A. 48) Meade and Mulchrone's ". . . actions reasonably could have been found to have encouraged the continuation of the unfounded prosecution by suppressing the development of inconsistent evidence against the raiders, Hanrahan and Jalovec." *id.* 629. They, of course, had no power over prosecutors Hanrahan and Jalovec, who were neither Chicago police nor city employees. Moreover, they had nothing to do with the operation of the grand jury that indicted the apartment occupants, and were prohibited by Illinois law from communicating with a grand jury, unless testifying before it, about any person's alleged wrongdoing. *People* v. *Parker*, 397 Ill. 305 (1947); affirmed per curiam 334 U.S. 816.

inal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?'' The complaint for the search warrant herein stated that Assistant State's Attorney Jalovec had a conversation with a reliable informant who told him about illegal weapons stored at Plaintiffs' apartment. Jalovec received this information from FBI agent, Defendant Mitchell (Tr. 24395-8, 24403-6), who in turn received it from William O'Neal, a defendant herein, a Black Panther who was a paid confidential informant of Mitchell's.*

O'Neal's information was accurate. Recovered from the apartment were nineteen firearms. None were registered with the City of Chicago to any apartment occupant.** There was a stolen Chicago Police Department shotgun, as well as a shotgun sawed-off to an illegal length (PX 79). A second informant was asserted in Groth's affidavit for the search as having also provided information about illegal weapons at the premises. Plaintiffs made a veracity challenge to Groth's affidavit by contending that he had *no* such informant. In *Franks* v. *Delaware,* at 155, 156, this Court said

> ''. . . we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided . . .''

* The identity of confidential FBI informant O'Neal was disclosed in a criminal prosecution well in advance of the trial of this cause.

** Illinois law prohibited possession of a firearm or firearm ammunition by a person, such as Hampton or Truelock, convicted of a felony within five years. Ill. Rev. Stat. 1969, Ch. 38, §24-3(d) and §24-3.1(3).

Prior to trial, and during trial, Plaintiffs never sought a veracity hearing challenging the validity of the warrant ''accompanied by a statement of supporting reasons.'' *Franks* v. *Delaware, id.* 171. The requirement that, ''Affidavits of sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained,'' also was not met. *id.* 171. Although State Defendants do not know why Plaintiffs never sought such a hearing pursuant to a *Franks* type criteria, it may be that the reason was that Illinois law did not then permit such veracity challenges. This, of course, was changed by *Franks* as this court so held, after the trial of this cause, in *Hall* v. *Illinois,* 438 U.S. 912 (1978).

Even if they had sought a veracity challenge, however, it would have been to no avail, since the warrant could stand on the basis of *Franks* v. *Delaware* because of the other informant.*

B. The Seventh Circuit did not hold that the search warrant was invalid. The Plaintiffs ''. . . contend that only disclosure of the identity of Groth's informant—if, in fact, one exists— will permit a full inquiry into whether

* Jalovec's informant was Mitchell, who was certainly known to him to be credible and reliable. Mitchell's informant was O'Neal. Mitchell testified O'Neal was reliable and credible.

probable cause existed for the issuance of the warrant (A. 61, *Hampton* 635).

The conclusion must be that under *Franks,* this warrant cannot be subject to a veracity challenge because it is both presumed valid and is valid based on the information of Mitchell-O'Neal. Yet, the Seventh Circuit chooses not to follow *Franks,* although State Defendants argued to that Court that it should, and allows disclosure because it *may be* essential to a fair determination of the cause.

1. The opinion states (A. 61, *Hampton* 635) that "Groth's complaint for the search warrant further stated that Jalovec told Groth that he, too, had a conversation with a reliable informant who told him that illegal weapons were stored in the apartment." The opinion footnotes that, in fact, Assistant State's Attorney ". . . Jalovec did not have an informant who saw the weapons in the apartment. Instead, Jalovec was told about the weapons by Mitchell who, in turn, had learned about the weapons from his informant, O'Neal." (A. 61, *Hampton* 635). This forms the basis for the Court saying "misrepresented" when it states the basis for the warrant would be "misrepresented hearsay", if Groth's informant were not considered or did not exist. The simple answer is FBI Agent Mitchell *informed* Jalovec. However, the Seventh Circuit itself in an opinion of *Judge Fairchild, joined in by Judge Swygert,* upheld a search warrant in *United States* v. *Edge,* 444 F.2d 1372, 1375 (7th Cir. 1971), cert. den. 404 U.S. 855 where one agent filed an affidavit and complaint for a warrant saying the information was supplied to him by another agent who got it from a reliable informant (hearsay on hearsay) saying:

> "There is no constitutional nor federal evidentiary rule that a defendant, in attacking the existence of probable cause for an arrest or search has a right to learn the identity of an informant." citing *McCray* v. *Illinois,* 386 U.S. 300, 311-312 (1967).

2. Although the year is 1980, in a Section 1983 and 1985 action, Plaintiffs submit that George Orwell's *1984* is upon us. They are programming this Court to believe that it is all right to base a search warrant on multiple hearsay if, as Plaintiffs assert in the first footnote on Page 68 of their brief, the "original 'informant' was a computer", as opposed to O'Neal to Mitchell to Jalovec. Perhaps there was a loose terminal when Respondents attempted to distinguish the holding of the Seventh Circuit *en banc. U.S.* v. *Wilson,* 479 F.2d 936 (7th Circuit 1973)*. State Defendants stand by the holding therein as set forth in our Petition for Certiorari at Page 54 that the use of hearsay upon hearsay is permissible.

C. Groth testified extensively, both in trial and pretrial as to what his informant told him. Plaintiffs here

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* All three of the judges in the panel below participated in *U.S.* v. *Wilson.* Judges Fairchild and Pell were in the majority with Judges Cummings, Stevens and Sprecher, Judges Kiley and Swygert concurred in part and dissented in part.

Wilson was a prosecution for possession of an unlicensed sawed-off shotgun found in a car trunk after a warrant search. An affidavit and complaint for a search warrant was prepared, as in the case at bar, based on multiple hearsay, for search of a car for stolen credit cards based on the following facts: the officer learned from another state trooper, who had arrested defendant, that this arresting trooper had learned from a bulletin which was prepared by another employee of the state police, who had learned from a telephone call from an employee of a gas service station, who learned by telephone from an *unknown* American Express employee that defendant possessed and used a stolen credit card. The affiant officer sought a search warrant of defendant's car for additional stolen credit cards. The same Seventh Circuit (en banc) held that this multiple of hearsay, more than triple, was sufficient to show probable cause.

seek the identity of the informant to determine if there was one, and if so, to discover what, if any, part such informant might have had in any other facets of the controversy.

The opinion of the Seventh Circuit sets forth that the District Court as mandated by *Roviaro* v. *United States,* 353 U.S. 53 (1957), "never attempted to apply the *Roviaro* balancing test or to determine whether disclosure was essential to a fair determination of Plaintiffs' cause of action." (A. 65, *Hampton id.* 637). The Court below then states that ordinarily it would remand the disclosure issue for adjudication pursuant to the appropriate standards, but then says that "enough evidence relevant to the validity of Groth's assertion of informer's privilege has been amassed throughout the trial to make such a remand unnecessary." (A. 65, *Hampton id.* 637). Judge Swygert then does *not* hold the warrant invalid, Judge Pell in his dissent states that the search warrant is valid independent of whether or not Groth had a warrant (A. 115, *Hampton id.* 663). If the *Roviaro* balancing test was not applied by the District Court (although we believe it was and correctly so) as the Seventh Circuit states, or erroneously applied, of course the case *should be remanded* to the District Court.

D. Plaintiffs in their Brief have tried to lead this Court to believe that there no longer is a physical danger to Groth's informant. This certainly conflicts with the fact that Federal Defendant O'Neal continues to receive witness protection by the Federal Government, including a new identity. Moreover, before and throughout the entire course of the trial, threats were received against the lives of the State Defendants—on most occasions Groth, Davis

and Jones—as well as the lives of the attorneys, their staff and their families.* Defendant Carmody's wife, who had an unlisted phone number, received threatening calls at home. Tr. 3774-5. Even the Court on February 10, 1976, reported that Judge Perry's assistant received a phone call in his chambers threatening the lives of Defendants Davis and Groth. Tr. 3983. These threats were reported to the Court and Police Department on most occasions. Total security was maintained outside the courtroom because of threatened violence, demonstrations and tense atmosphere. An electronic detecting device was used in the corridor outside the courtroom. On one occasion a spectator was caught attempting to carry the bolt action of a weapon into the courtroom. Tr. 3775, 3859. On another occasion, bullets were found in a woman's purse. Even at trial, there was testimony concerning the reported torture by members of the Black Panther Party of a suspected informant by pouring boiling water on the person, peeling off the scalded skin and then shooting him to death. Tr. 8221.

The opinion of the Seventh Circuit does not consider these problems in applying *Roviaro* and ruling that disclosure should be made.

E. Plaintiffs in their Brief refer to civil cases in which disclosure of informants was ordered. This, of course, points to the fact that courts are in conflict on this issue and the application of *Roviaro* v. *United States,* 353 U.S. 53 (1957) as we submitted in our Petition for Writ of Certiorari at Page 56. One of the cases they submit (Reply

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* Some reports of threats received appear at Tr. 8639-8652, 6671, 6797, 8815, 10002, 11?33, 12160, 12415, 13097, 13099, 13467-9, and 15625.

Brief Page 64) this Court should see is a New Jersey state case "*Cashen* v. *Spann,* 311 A.2d 192 (1973), 334 A.2d (1975); 364 A.2d21 (1976); 376 A.2d 186 (1977)." (sic) This case was reversed, *Cashen* v. *Spann,* 77 N.J. 138, 389 A.2d 969 (1978), however, holding therein that ". . . the presumption protecting the informant should be upheld." *id.* 971. A trial court hearing had previously been required on the issue of whether the informant should be disclosed. The import of such a hearing, ignored by the Seventh Circuit, can readily be seen from what the New Jersey Supreme Court recited in *Cashen* in reversing the Appellate Court decision cited by Respondents herein:

> ". . . plaintiffs relied only upon argument. No affidavits or evidence were offered. The defendants produced two witnesses, Stephen Champi, Somerset County Prosecutor and president of the New Jersey County Prosecutors' Association, and defendant Dunne. Mr. Champi testified to the importance of informers to law enforcement officers in the investigation and apprehension of criminals in gambling. He said that if the informant in this case were identified, this informant would thereafter refuse to cooperate with the police and other informers would follow in those footsteps. Emphasizing that informers insist on remaining completely anonymous, he testified that all 21 county prosecutors had discussed this case and shared these opinions.
>
> Defendant Dunne, who had been in the Morris County Prosecutor's Office since 1965, testified to the importance of informers in the Confidential Intelligence Unit which he headed. This Unit dealt with gambling, municipal corruption and organized crime. In about 90% of its investigations informants were used. Confidentiality of their identity was essential. Their arrangements provided that, if the informant's testimony were needed, the prosecution would be dropped. Dunne testified that divulging the informant's name in this case would be devastating to police enforcement be-

> cause it would eliminate that individual source as well as other sources of information." *id.* 970.

If the District Court, who questioned and observed Defendant Groth after Plaintiffs obtained all the information the informant gave to Groth, was wrong in not properly applying a *Roviaro* balancing test, which we do not concede, particularly in light of *Franks* v. *Delaware* (whose applicability was argued to the Seventh Circuit), then a remand for further hearing is warranted instead of a summary reversal as Judge Pell in his dissent contends (Appendix 115, *Hampton id.* 663).

III.

THE DECISION IS CONTRARY TO THE EXPRESS AND IMPLICIT RULING IN *IMBLER v. PACHTMAN* AND ITS PROGENY.

Since the State Defendants filed their Petition for Certionari the Fifth Circuit decided *Henzel* v. *Gerstein,* 608 F.2d 654 (5th Cir. 1979). There the prosecutors were sued for

> ". . . §1983 violations in their conduct of the prosecution and various appeals. The alleged unlawful acts include: filing an information without investigation, filing charges without jurisdiction, filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate Henzel's complaints about the prison system, threatening Henzel with further criminal prosecutions . . ." *id.* 657.

The Court then held:

> "(immunity extends to filing complaints, instituting arrest or search proceedings, and drawing indictments or informations). The prosecutorial actions that form the basis of Henzel's claims unquestionably fall within the bank of prosecutorial immunity. The actions com-

plained of were a necessary and integral part of a prosecutor's role in the judicial system." (sic) *id.* 657.

Even accepting Plaintiffs' contentions that the prosecutors' activities (Hanrahan and Jalovec) were "investigative", the result will be that the Seventh Circuit is in conflict with the Fifth Circuit and the D. C. Circuit. In *Henzel,* the Fifth Circuit has construed *Imbler* v. *Pachtman,* 424 U.S. 409 (1975) to immunize failure to investigate before filing charges, and refusing to investigate plaintiffs' complaints about a prison system. Here, Plaintiffs have tried to show that the prosecutors exercised some supervisory capacity over the service of a court order (the warrant), and therefore they acted in an investigative capacity. *Henzel* held failure to investigate is immunized by *Imbler.*

State Defendants submit that *Simons* v. *Bellinger,* 48 LW 2469 (D.C. Cir. January 4, 1980) decided since the filing of their Petition for Certiorari, immunized committee members who *investigated* Plaintiffs to determine whether they were engaged in unauthorized practice of law, is also in conflict with the Seventh Circuit's decision below.

Plaintiffs have attempted to create liability on the part of the two prosecutors for acts allegedly done by police officers when they served the search warrant and met armed resistance. There, of course, was no evidence that any prosecutor was at the scene of the shooting on or before December 4, 1969. No one testified, nor was there any evidence that any police officer fired his weapons because anyone told him to fire, or injure anyone. There was no evidence that either prosecutor determined, ordered or instructed who to take, what to take or when to serve the warrant. All such decisions were made by policemen.

Plaintiffs in their Brief for Respondents in response to the immunity issue have, as they have done with virtually all other issues raised in State Defendants' Petition for Certiorari, argued the merits of the case as opposed to addressing why this Court should or should not grant the Writ of Certiorari.

IV.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION IN *YASELLI v. GOFF* AND DECISIONS OF OTHER CIRCUITS BECAUSE THE COURT BELOW ALLOWED THE USE OF PRIOR TESTIMONY OF A WITNESS AS SUBSTANTIVE EVIDENCE OF THAT WITNESS'S CONSPIRING TO VIOLATE OR TO DEPRIVE CONSTITUTIONAL RIGHTS.

Plaintiffs assert at Page 29 of their Brief that it is *dicta* in *Yaselli* v. *Goff,* 12 F.2d 396 (2nd Cir. 1926) aff'd 275 U.S. 593 (1927) that witnesses should receive absolute immunity from liability based on testimony and that only a small part of their case depends on it. *Yaselli* states that Goff "complained of the Plaintiff before the grand jury," *id.* 397, and "maliciously, wilfully and corruptly caused to be introduced and used before the aforesaid grand jury a great mass of false, misleading . . . testimony and evidence". The holding of immunity for testimony in *Yaselli* was not dicta.

The only evidence presented against those State Defendants who went to the premises but were non-shooters was testimony previously given by them before non-adversary proceedings such as Grand Juries or a Coroner's Inquest. Those police officers, William Corbett, Lynwood Harris, Robert Hughes, Philip Joseph, William Kelly and John Marusich were assigned to stand watch outside the premises and never fired a weapon. There is no testimony

that any of them injured anyone, or was in any room in the apartment when there was any firing in that room. After sixteen months of trial, without any Plaintiff identifying any of them, and without being called by Plaintiffs to testify, their motions for directed verdict were granted by the District Court. Similarly, the Internal Inspections Division personnel employed by the Chicago Police Department (see Part I hereof) who administered the internal disciplinary proceeding (Mulchrone, Meade, Ervanian and Kukowinski) neither testified nor were identified by any Plaintiff in the course of the sixteen months of their trial before the District Court granted their directed verdicts at the close of the Plaintiffs' case. Only their prior testimony in non-adversary proceedings such as before Grand Juries was used.

V.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION AND THAT OF THE FIFTH AND TENTH CIRCUITS ON THE ISSUE OF LIABILITY OF A SUPERVISOR FOR THE ALLEGED CONSTITUTIONAL TORTS OF A SUBORDINATE UNDER 42 U.S.C. §1983 *et seq.*

Plaintiffs' Brief has tried to make the prosecutor responsible for evidence gathering at the premises at the apartment even though they know the evidence shows that numerous other police officers, including several evidence technicians, not under the supervision of the Office of the State's Attorney of Cook County and not defendants herein, had that responsibility and did gather evidence, and were at the apartment immediately following the cessation of firing and the securing of the apartment.

Plaintiffs, in their Brief, attempt to tell this Court that State Defendants are incorrect in stating that the Fifth

Circuit in *Baskin* v. *Parker,* 602 F.2d 1205 (5th Cir. 1979)* conflicts with the Seventh Circuit. There the Court said at p. 1208:

> "The dismissal of the Sheriff from personal liability for the unreasonable manner in which the warrant was executed is supported by evidence that he did not accompany the search party and that he arrived at the Baskin property after entry into the houses had been effected and the search commenced. There is no evidence that he participated in any property destruction."

We, therefore, submit that neither prosecutor, Hanrahan nor Jalovec, can be liable if, as alleged, the search warrant was executed in an unreasonable manner because they were not present. The Fifth Circuit Court did say that the warrants in question were obtained by another deputy sheriff, Smith, who, ". . . lacked probable cause to obtain the warrants . . . and such other deputy knew or should have known it . . ." *id.* 1207. As to the Sheriff (Parker) the Court found that the District Court should have made an express finding with regard to the Sheriff's *pre* service warrant conduct. *Baskin* required remandment for such findings but *not* for a new trial. Moreover, the facts are distinguishable as can be seen below since Groth was the supervisor of the execution of the warrant and in no way could the Sheriff in *Baskin* be said to have been engaged in the duties of a prosecutor. The *Baskin* Court held:

> However, as we have noted, there was neither explicit nor implicit finding with respect either to his participation in obtaining the warrants or to his part in organizing the search. According to his own testimony, "I had been trying to get enough information together

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* This case was not decided en banc as Plaintiffs assert at Page 48 of their Brief.

to in fact get a search warrant or to make a case on this particular defendant. . . . [W]e had been working the cases for quite some time." He testified that he was aware of the hearsay nature of the evidence and of the source of at least some of it. He made no effort to have Mrs. Baskin served. Moreover, State Trooper Don McDonald testified that at least part of the posse of seven to ten men assembled in the Sheriff's office and that Sheriff Parker directed two of the men, a deputy and a state trooper, to go to the place Gary Baskin was employed to attempt to locate him and bring him to the property with instructions that, if they could not, they were to rendezvous with the rest of the group at a church near the Baskin property and join them in the raid. The sheriff's brief concedes, as he must, that he authorized the investigation and organized the search party.

This evidence points toward active participation by Sheriff Parker in obtaining the warrants and in supervising their execution. The trial court should have made express findings as to whether these actions by the Sheriff violated Section 1983, and whether the extent of his participation rendered him liable for damages." *id.* 1208.

VI.

THE COURT BELOW FAILED TO APPLY THE REQUIREMENT THAT TO ESTABLISH LIABILITY UNDER 42 U.S.C. §1985(3), AN INVIDIOUSLY DISCRIMINATORY ANIMUS MUST BE PROVED AGAINST EACH PERSON SOUGHT TO BE HELD LIABLE THEREUNDER.

In their Brief, Plaintiffs do not believe that this is so required. State Defendants submit that perforce Plaintiffs and the Seventh Circuit decision, have misread 42 U.S.C. §1985 and have made it into a statute prohibiting a conspiracy to commot a common law tort independent of equal protection or other constitutional deprivations.

VII.

THE DECISION BELOW, BY SUSTAINING A CAUSE OF ACTION FOR CONSPIRACY TO VIOLATE 42 U.S.C. §1983, HAS CREATED SUBSTANTIVE RIGHTS CONTRARY TO THE LAW AS ANNOUNCED BY THIS COURT.

Plaintiffs concede the above in their Brief. State Defendants submit that for conflict with *Chapman* v. *Houston Welfare Rights,* ..... U.S. ....., 60 L.Ed.2d 508 (1979) the writ should be granted.

VIII.

THE COURT BELOW IS IN CONFLICT WITH OTHER CIRCUITS IN PLACING THE BURDEN OF PROVING GOOD FAITH ON DEFENDANTS.

In Plaintiffs' Brief it appears that they finally have realized that it is necessary to prove bad faith. No Plaintiff or other witness made an identification of any State Defendant, including non-shooting State Defendants, as being present after shooting had ceased, or threatening, or having beaten anyone or watched anyone beat anyone. All fourteen State's Attorney's Police, who were the only Cook County State's Attorney's Office personnel at 2337 West Monroe at the time in question or any time on December 4, 1969, all parties agree, wore plain clothes. Plaintiffs, at page 54 of their Brief, say that "admissions placed the non-shooting Defendants in the pre-raid planning meetings (which they were, and there is *no* evidence thereat that any constitutional violations were planned or contemplated but only that service of a search warrant for illegal weapons at the premises was planned and discussed), and in the apartment, when some Defendants beat and racially abused the Plaintiffs, while others callously chose to watch. . . ." This is supposed to be proof of Bad Faith! (Parenthetical comment added). As to the non-

shooters, we invite this Court's attention to Judge Pell's dissent at pages 103, 104, 105, 106 and 107 of Appendix A of the Petition for Writ of Certiorari, *Hampton, id.* last paragraph 656, 657, 658, 659. According to Judge Swygert's opinion, which Judge Pell answered, the basis for saying any Defendants were present during such alleged abuse after the shooting was Plaintiff Louis Truelock's testimony, not in the trial but, before a State Grand Jury*, see page 43 of Petitioner's Appendix, footnote. *Hampton, id.* 626.

The plain answer is Plaintiffs must prove bad faith for each person sought to be held liable under 42 U.S.C. §1983 *et seq.*

This Court, since the filing of State Defendants' Petition for Certiorari, has granted a Writ of Certiorari in a case which further conflicts with the holding of the Seventh Circuit. *Gomez* v. *Toledo,* 602 F.2d 1018 (1st Cir. 1979), *cert. granted,* 48 L.W. 3451 (Jan. 14, 1978) held that "with

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* This is the same Special Cook County Grand Jury proceeding conducted by a Special Prosecutor, 70 S.G.J. 3, in which the same Louis Truelock testified at Page 36 of his testimony:

"Q. Did you fire a gun in that apartment?

"A. No."

In the trial in the District Court, *both* sides introduced Truelock's signed sworn witnessed statement (PX LT5, DX 157 see Tr. 15937 *et seq.*) in which he said to Donald Steng, his attorney, at Page 22 thereof:

"D: As far as you know, did anybody in the house get off any shots at all, including yourself?

"T: Oh, there were two shots fired, and uh, at this point here, there were two shots fired in this direction. (sic)

"D: Would you put a letter N at the point you're talking about? Who fired them?

"T: I fired those two.

"D: With what?

"T: With a rifle."

the law now so clear on this point, it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action."

IX.

THE *EN BANC* PROCEDURE OF THE COURT BELOW CONFLICTS WITH THE NORMS SET BY THIS COURT AND THE INTENTION OF CONGRESS.

Frequently, *en banc* petitions are granted in Courts of Appeals because of a conflict between the panel which rendered litigants' decisions and prior precedent. In the instant case however, the Plaintiffs petitioned the Seventh Circuit seeking to reverse the District Court's pre-trial order refusing to compel disclosure of Groth's Confidential Informant. After briefs and argument on the application of the balancing test of *Roviaro* v. *United States,* 353 U.S. 53 (1957), the Seventh Circuit denied the mandamus, holding that the District Court did not abuse its discretion. *Hampton* v. *Hanrahan,* No. 75-1391 (7th Cir. 1975) (unreported). Judge Swygert was not a member of the panel in that opinion. The case proceeded to trial, was appealed by Plaintiffs to the Seventh Circuit, whereupon Judge Swygert wrote the opinion, reversing the District Court (*without* remanding the question back to the District Court for reconsideration*), and held that "the trial Judge never attempted to apply the *Roviaro* balancing test or to determine whether disclosure was essential to a fair determination of Plaintiffs' cause of action." *Hampton* v. *Hanrahan,*

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* *Franks* v. *Delaware,* 438 U.S. 154 (1978) at minimum requires a veracity challenge, evidentiary hearing on the warrant prior to disclosure, which Judge Swygert has ignored by, in effect, requiring disclosure to find out the veracity of the warrants.

600 F.2d 600, 637 (7th Cir. 1979). With two panels reaching contrary results voting on whether to hear *en banc* by all regular active Judges should be mandated. Moreover, as pointed out in other sections, the decision in the Court below, conflicts with prior Seventh Circuit decisions involving use of hearsay in applications for search warrants, as well as other issues.

In State Defendants' Petition for Rehearing *En Banc* filed in the Seventh Circuit on May 29, 1979, State Defendants asked that no Judge be recused* on the questions of voting whether or not to hear the case *sub judice*. (As pointed out in our Petition, we submitted that voting to hear, and participation in the *en banc* hearing, were two separate matters). We further therein asked that if recusals persisted, that the Circuit be filled pursuant to 28 U.S.C. §291(a). There are no published rules of the Seventh Circuit concerning internal procedures governing *en banc* voting, recusal therefrom, or filling the Circuit. (Nonetheless Plaintiffs in their Brief assert that the Seventh Circuit followed their regular procedure, which State Defendants submit is unpublished).

Plaintiffs, in their Brief, have failed to answer the requirement of *Western Pacific Railroad Case,* 345 U.S. 247 (1953) asserted in State Defendants' Petition for Certiorari requiring Circuits to clearly explain their *en banc* procedure.

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* Neither Judge Bauer nor Judge Wood have given reasons why they have recused themselves, although Plaintiffs, in their Brief, have set forth reasons.

X.

PUBLIC OFFICIALS HAVE A FIRST AMENDMENT RIGHT TO RESPOND TO ACCUSATIONS OF MISCONDUCT.

All of the public statements made by the elected State's Attorney Hanrahan and the police Defendants were expressions of speech, not "speech plus." In response to our Petition for Certiorari, Plaintiffs failed to show why this speech is not protected by the First Amendment, because it created a clear and present danger of anything.

The incident, the community tension, the instant accusation of murder by the Black Panther Party on December 4, 1969, *required* information concerning what Cook County State's Attorney's personnel had done. As held in *Mills* v. *Alabama,* 384 U.S. 214, 218-219 (1966):

> ". . . First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."

The panel decision crosses a dangerous frontier in holding that the TV reenactment and press conferences are in themselves actionable under Sec. 1983. The State Defendants are now told, self censor yourselves concerning your acts done in carrying out your governmental duties, even though you are publicly accused of murder.

The panel opinion failed to examine Defendants' words. As said by Mr. Justice Reed, the Court must examine

> ". . . the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the court or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida,* 328 U.S. 331, 335 (1946).

There was no evidence introduced to show that, because of State Defendants' words, as Justice Brandeis said:

> ". . . whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by . . ." [this panel decision]. *Whitney* v. *California,* 274 U.S. 357, 378 (1927).

Moreover, "The danger must not be remote or even probable, it must immediately imperil." *Craig* v. *Harney,* 331 U.S. 367, 378 (1947).*

XI.

AS CONSTRUED AND APPLIED BY THE COURT BELOW 42 U.S.C. §1988 VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHTS, IS CONTRARY TO CONGRESS' INTENT AND CONFLICTS WITH OTHER CIRCUITS.

Since the State Defendants filed their Petition for Writ of Certiorari, the Sixth Circuit published an opinion, in a civil rights case, reversing a District Court's *directed verdict in Defendant's favor. Hildebrand* v. *Board of Trustees of Michigan State University,* 607 F.2d 705 (6th Cir. 1979). Plaintiffs-Appellants were denied attorneys' fees.

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* This Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. See *Bridges* v. *California,* 314 U.S. 252; *Pennekamp* v. *Florida,* 328 U.S. 331; *Craig* v. *Harney,* 331 U.S. 367; *Wood* v. *Georgia,* 370 U.S. 375. What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges* v. *California, supra,* 314 U.S. at 263 and that a "solidity of evidence," *Pennekamp* v. *Florida, supra,* 328 U.S. at 347 is necessary to make the requisite showing of imminence, which Plaintiffs herein did not even try to do in the District Court.

The Court held:

> "We think that this request is premature. The Plaintiff has indeed prevailed on this appeal, but he has yet to establish that his rights were violated. Until he does, we do not think that the defendants should have to pay his attorney's fees. Otherwise, innocent defendants could end up paying for losing plaintiffs' procedural victories.
>
> We are aware that Congress has authorized the award of attorney's fees pendente lite or upon a partial vindication of one's civil rights. See Sen. Rep. No. 94-1011 5 (1976) reprinted at 1976 U.S. Code, Congressional and Administrative News 5908, 5912. Here, however, the plaintiff's appeal had nothing to do with the merits of his claim.
>
> Plaintiff emphasizes that under the Act, attorney's fees are owed 'as part of the costs'. He argues that since he is entitled to costs, his attorneys should also be entitled to attorney's fees. We think that this is too restricted a reading of the statutory language. This reading ignores Congress' intent to allow recovery only where rights are vindicated. A Plaintiff must be a 'prevailing' party on some substantial issue before he can collect attorney's fees. See *United States* v. *Alleghany-Ludlum Ind.,* 558 F.2d 749 (5th Cir. 1977); *Grubbs* v. *Butz,* 548 F.2d 973 (D.C. Cir. 1976) (applying analogous attorney's fees provision in the 1964 Civil Rights Act)." *Hildebrand* v. *Board of Trustees of Michigan State University,* #77-1435 (6th Cir. December 3, 1979). (sic)

This opinion, State Defendants submit, answers Plaintiffs' Brief, and is in conflict with the Seventh Circuit. This conflict alone warrants granting the Petition for Certiorari.

CONCLUSION

Wherefore, Petitioners State-Defendants pray that this Court, in view of the foregoing, issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

A. LOUIS TRULOCK—*Special Grand Jury Testimony (p. 36)*

"Q. Did you fire a gun in that apartment?
"A. No."

LOUIS TRULOCK—*Sworn Statement (p. 22)*

"D: As far as you know, did anybody in the house get off any shots at all, including yourself?
"T: On, there were two shots fired, and uh, at this point here, there were two shots fired in this direction.
"D: Would you put a letter N at the point you're talking about? Who fired them?
"T: I fired those two.
"D: With what?
"T: With a rifle."

B. HAROLD BELL—*Special Grand Jury Testimony*

Mr. Bell testified that his testimony, at the People's Inquest was true (pp. 13-14). At the People's Inquest he testified (p. 38):

"Q. At any time did you have a gun in your hand?
"A. No, I didn't."

HAROLD BELL—*Statement (p. 69)*

"Q. And did you have a shotgun in your hands at that time?
"A. Is on tape?
"Q. Yeh.
"A. Yes.
"Q. What kind of piece did you have in your hands?
"A. I think it was an automatic, I'm not sure. I don't even know whether automatic or pump.
"Q. Yeh, OK. Do you know what kind of shell it had in it?
"A. I think it was 12 gauge."

C. BRENDA HARRIS—*Special Grand Jury Testimony (pp. 42-43)*

"A Juror: Did you at anytime handle the shotgun during that night?

"The Witness No."

BRENDA HARRIS—*Statement (pp. 48-49)*

"Q. Trulock what?

"A. He went in the back. And then, I grabbed the shotgun.

"Q. Now, when you heard the knocking, did you hear anything else?

"A. No, I just heard 'em talking. You know, saying, you know, 'open up.'

"Q. They say anything else?

"A. They said, 'Policemen, brothers, open up.'

"Q. And did they say anything else besides that?

"A. That's all they said. They said it twice.

"Q. And, what was the next thing you did after you heard them say that?

"A. Grabbed the shotgun.

"Q. What kind of shotgun did you grab?

"A. It was a pump."

D. BLAIR ANDERSON—*Special Grand Jury Testimony (p. 64)*

"Q. Did Ronald Satchel have a gun in his hands at anytime in that room during that shooting?

"A. Not to my knowledge.

"Q. Did Verlina Brewer have a gun in her hand?

"A. No.

"Q. Did you have a gun in your hand?

"A. No."

BLAIR ANDERSON—*Statement*

". . . And he [Ronald Satchel, also known as Doc] said, 'The pigs are m. . . and I grabbed Verlina, and I grabbed a shotgun. Then he grabbed a shotgun. We got down on the floor."

". . . it seemed like someone kicked the door open or something, right before I heard, when I think I heard Doc shooting."
